STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	UNPUBLISHED December 19, 2006
V	No. 257152 Wayne Circuit Court
JOSEPH D. BLACK, Defendant-Appellee.	LC No. 98-012267-01

Before: Hoekstra, P.J., and Wilder and Zahra, JJ.

PER CURIAM.

Plaintiff, the Wayne County prosecutor, appeals by right from an order dismissing charges against defendant for violation of his right to a speedy trial. US Const, Am VI. We reverse and remand.

I.

This case was decided, in part, by a stipulation of fact containing numerous dates, including (but not limited to) the following. The homicide in question in question occurred on August 30, 1994. On September 3, 1994, the police issued a warrant for two suspects, Glenn Ethridge and defendant, and the warrants were placed on the LEIN (law enforcement information network). In the fall of 1995, Ethridge was tried, convicted and sentenced to life in prison.

In March 1996, Sergeant Robert Bugarelli of the Fugitive Task Force began to look for defendant. Later in March 1996, a federal court warrant was issued for defendant for unlawful flight to avoid prosecution. In July 1996, police Officer Cheryl King of the Fugitive Task Force obtained a Detroit newspaper advertisement listing defendant as a wanted suspect. Also in July 1996, police first surveilled the home of defendant's parents as well as the home of defendant's grandmother.

In October 1996, King distributes her first fugitive circular to Detroit police officers listing defendant as a wanted suspect. In December 1996, there was further investigation of defendant's parents' home. From March, 1997 through February 1998, King ran advertisements seeking defendant's arrest in various newspapers. On January 30, 1998, a man with the same name as defendant was arrested, but a witness testified he was not the perpetrator, and the man was released.

On September 14, 1998, defendant was arrested in Fort Valley, Georgia. From November to December 1998 there were pretrial proceedings in the trial court, commenced by defendant. In May 1999, witness Frederick Williams died. (Williams, the 14-year-old driver of the car involved in the shooting, placed defendant in the front seat of the car as a shooter.) In May 2000, the trial court granted defendant's motion to be tried by a jury of Detroit residents. In September 2000, this Court reversed the trial court's ruling regarding jury composition. *People v Black*, unpublished order of the Court of Appeals, issued September 8, 2000 (Docket No. 227780). In February 2001, our Supreme Court denied defendant's application for leave to appeal from this Court's jury composition ruling. *People v Black*, 463 Mich 979; 623 NW2d 597 (2001). Approximately three years later, in March 2004, an assistant prosecutor contacted defendant's attorney to set a court date in this case.

In addition to the stipulated chronology of the above events, there was testimony adduced at an evidentiary hearing, including the following. The victim was murdered in a drive-by shooting. King prepared and circulated photographs of defendant to both print media and television, beginning in 1996. Bugarelli began searching for defendant in July 1996.

In April 1998, police received a tip that defendant might be living in Florida. Bugarelli investigated and found defendant had a Florida driver's license with an address in St. Petersburg. The federal warrant for unlawful flight was issued, but the FBI checked all over Pinellas County and the St. Petersburg area, but found no trace of defendant.

In June 1998, after reviewing the phone records of defendant's mother's home a second time,[1] Bugarelli determined that defendant was living near Atlanta, Georgia. Bugarelli contacted the FBI in Macon, Georgia in August 1998. This resulted in defendant's arrest by the FBI in September 1998.

In April 2004, defendant asserted his speedy trial rights by way of a motion to dismiss. From the stipulated chronology and testimony adduced at an evidentiary hearing, the trial court made numerous findings, including the following:

1. The defendant had no legal remedy, following the preliminary examination, to gain evidence lost by the death of witness Frederick Williams.

2. The prosecutor offered no proper reason for the delay between February 2001 and March 2004.

3. The fact that seven different prosecutors handled this case was not a valid excuse.

4. The death of Williams, an immunized witness at defendant's preliminary examination, was prejudicial to defendant.

[1] In December 1996, a federal court made available telephone records for a home belonging to defendant's mother. Bugarelli obtained six months of toll call records, but was able to obtain no evidence of where defendant was from the phone records.

The trial court dismissed the charges against defendant in July 2004. The prosecution appeals as of right.

II.

We review findings of fact in speedy trial cases for clear error. *People v Gilmore*, 222 Mich App 442, 459; 564 NW2d 158 (1997). We review constitutional claims de novo. *Id*.

III.

Defendant first argues that allowing the charges to proceed "at this late date" would deprive him of liberty without due process of law under the Michigan[2] and United States[3] constitutions. Second, defendant argues that allowing the charges to proceed would violate his right to a speedy trial under the federal sixth amendment[4] and under the Michigan constitution.[5] We consider defendant's arguments in turn.

A.

Defendant's claim that he would be deprived of due process of law if the charges are allowed to proceed to trial is novel. We find no support for defendant's argument, nor does defendant cite any. The authorities cited by defendant below are sixth amendment cases, not due process cases. E.g., *United States v Marion*, 404 US 307; 92 S Ct 455; 30 L Ed 2d 468 (1971). Defendant does not specify whether his due process claim is for procedural or substantive due process. If defendant's claim is for a procedural due process, we reject the claim for lack of authority to support it. *People v Russell*, 266 Mich App 307, 316; 703 NW2d 107 (2005) (where defendant "fails to cite specific supporting authority on appeal," the issue is deemed abandoned).

If defendant is asserting a substantive due process claim, it lacks merit. The United States Supreme Court "held in *Graham v. Connor*, 490 U.S. 386, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989), that '[w]here a particular Amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior, that Amendment, not the more generalized notion of substantive due process, must be the guide for analyzing these claims.'" *County of Sacramento v Lewis*, 523 US 833, 842; 118 S Ct 1708; 140 L Ed 2d 1043 (1998), quoting *Graham, supra* at 395 (other citation omitted). Here, the sixth amendment

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[2] The Michigan constitution provides: "No person shall . . . be deprived of life, liberty or property, without due process of law." Const 1963, art 1, § 17.

[3] The United States constitution provides: "nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ." US Const, Am XIV.

[4] The federal sixth amendment provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . ." US Const, Am VI.

[5] The Michigan constitution provides: "In every criminal prosecution, the accused shall have the right to a speedy . . . trial . . . ." Const 1963, art 1, § 20.

provides an explicit textual source of constitutional protection against government delay in bringing a suspect to trial. Therefore, the sixth amendment, and not the more generalized notion of substantive due process, must be the guide for analyzing defendant's claim.

B.

Defendant asserts violations of his right to a speedy trial under both the United States and Michigan constitutions. "Both the United States Constitution and the Michigan Constitution guarantee a criminal defendant the right to a speedy trial." *People v Cleveland Williams*, 475 Mich 245, 261; 716 NW2d 208 (2006). Michigan enforces this right both by statute and court rule. *Id*., citing MCL 768.1[6] and MCR 6.004(A).[7] The Michigan constitution's speedy trial provision has not been held to provide greater protection than the federal provision. Therefore, we conduct one unitary analysis of defendant's speedy trial violation claim. *Cleveland Williams, supra* at 260-265 (conducting unitary analysis of speedy trial violation claim under federal and state constitutions).

The prosecutor must timely try an accused. *Barker v Wingo*, 407 US 514, 527; 92 S Ct 2182; 33 L Ed 2d 101 (1972). But "[t]he time for judging whether the right to a speedy trial has been violated runs from the date of the defendant's arrest." *Cleveland Williams, supra* at 261, citing *Marion, supra* at 312. Because the time for judging whether the right to a speedy trial has been violated runs from the date of the arrest, the period of time in this case from the homicide in 1994 to defendant's arrest in 1998 is irrelevant to the speedy trial violation claim. Therefore, the trial court erred as a matter of law in concluding that the time period from the crime in 1994 to the arrest in 1998 could form the basis for a speedy trial violation claim. *Cleveland Williams, supra* at 261.

When evaluating speedy trial violation claims, *Doggett v United States*, 505 US 647, 651; 112 S Ct 2686; 120 L Ed 2d 520 (1992), directs courts to consider "[1] whether the delay was uncommonly long, [2] whether the government or the criminal defendant is more to blame for the delay, [3] whether, in due course, the defendant asserted his right to a speedy trial, and [4] whether he suffered prejudice as the delay's result." (Citing *Barker v Wingo*, 407 US 514, 530; 92 S Ct 2182; 33 L Ed 2d 101 (1972).) "Th[e] fourth element, prejudice, is critical to the

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[6]MCL 768.1 provides:

> The people of this state and *persons charged with crime are entitled to and shall have a speedy trial* and determination of all prosecutions and it is hereby made the duty of all public officers having duties to perform in any criminal case, to bring such case to a final determination without delay except as may be necessary to secure to the accused a fair and impartial trial. [Emphasis added.]

[7] MCR 6.004(A) provides: "*The defendant and the people are entitled to a speedy trial* and to a speedy resolution of all matters before the court. Whenever the defendant's constitutional right to a speedy trial is violated, the defendant is entitled to dismissal of the charges with prejudice." (Emphasis added.)

analysis." *People v Cain*, 238 Mich App 95, 112; 605 NW2d 28 (1999). "Following a delay of eighteen months or more, prejudice is presumed, and the burden shifts to the prosecution to show that there was no injury." *Cleveland Williams, supra* at 262. "Under the *Barker* test, a presumptively prejudicial delay triggers an inquiry into the other factors to be considered in the balancing of the competing interests to determine whether a defendant has been deprived of the right to a speedy trial." *Id*. (internal quotation marks and citation omitted).

Following defendant's arrest in September 1998, the delay in bringing him to trial may be divided into two periods. First, there was the period from 1998 through 2001, when his trial was delayed by the trial court proceedings and appeals relating to defendant's pretrial motions. Because this first post-arrest period from 1998 through 2001 was occupied by trial court and appellate proceedings, rather than by any delay on the part of the prosecution, we hold that this delay cannot form the basis for a valid speedy trial violation. See *United States v Loud Hawk*, 474 U.S. 302, 316; 106 S Ct 648; 88 L Ed 2d 640 (1986) ("In that limited class of cases where a pretrial appeal . . . is appropriate . . . delays from such an appeal ordinarily will not weigh in favor of a defendant's speedy trial claims" (citation omitted)); *United States v Ailemen*, 43 Fed Appx 77, 81 (CA 9, 2002) ("The second factor does not militate in Ailemen's favor because *most of the delay was caused by pretrial litigation* and Ailemen's change of counsel. Neither cause of delay can be blamed on the government" (emphasis added; citations omitted)). To hold otherwise would allow a defendant to bring pretrial motions that ultimately fail on appeal, and then to obtain a dismissal of the action by reason of the delay caused by the pretrial litigation.

The second post-arrest period ran from February 2001 (when the Supreme Court denied defendant's application for leave to appeal), to April 2004. (In April 2004, defendant finally asserted his speedy trial right.) Because the first post-arrest period from 1998 through 2001 has been rejected as the basis for a speedy trial violation claim, the three year period from 2001 through 2004 necessarily forms the basis for defendant's speedy trial violation claim.

The first factor is the length of the delay. *Cleveland Williams, supra* at 261. Here, the delay at issue was approximately three years. We acknowledge that this is a long period of time. *People v Chism*, 390 Mich 104, 115; 211 NW2d 193 (1973) (acknowledging that a 27 month delay is a significant personal hardship). Thus, this factor weighs in defendant's favor.

The second factor is the reason for the delay. *Cleveland Williams, supra* at 261. Here, there is no evidence in the record for the reason for this particular relevant delay from 2001 to 2004. While unexplained delays are generally attributed to the prosecution, *People v Ross*, 145 Mich App 483, 491; 378 NW2d 517 (1985), we also note that the trial court was negligent as well in failing to schedule a trial following the conclusion of appeals in 2001. Delays attributable to the court system, although technically attributable to the prosecution, are given a neutral tint and are assigned only minimal weight in determining whether a defendant was denied a fair trial. *Cleveland Williams, supra* at 263. Thus, given that the unexplained delay in this instance is attributable to both the prosecution as well as the trial court, this factor weighs only slightly in favor of defendant.

The third factor is whether, in due course, the defendant asserted his right to a speedy trial. *Doggett, supra* at 651. Here, defendant did not assert his right to a speedy trial in due course. Rather, defendant failed, from 2001 through 2004, to assert his right. Defendant's failure to assert his right contributed to this particular delay.[8] This factor weighs heavily against defendant. *Barker, supra* at 531-532 ("defendant's assertion of his speedy trial right . . . is entitled to *strong evidentiary weight* in determining whether the defendant is being deprived of the right" (emphasis added)); *Cleveland Williams, supra* at 263 ("trial court did not clearly err in weighing this factor heavily against defendant" where he did not assert his speedy trial right until the day before trial).

The fourth factor is whether defendant was prejudiced by the delay. *Cleveland Williams, supra* at 262. There are three kinds of prejudice: oppressive pretrial incarceration, anxiety, and impairment of defense. *Doggett, supra* at 654.[9] Here, it is undisputed that defendant was free on bond. Therefore, he could not have suffered oppressive pretrial incarceration. *People v Rosengren*, 159 Mich App 492, 508; 407 NW2d 391 (1987). Second, defendant has presented no evidence that he suffered from anxiety as a result of the delay from 2001 to 2004. (Indeed, had he suffered from anxiety, he should have asserted his right to a speedy trial.) In any event, even if defendant suffered anxiety as a result of the considerable delay (which we may presume he did), "that is of minimal importance in the scale of things when weighed against the offenses charged[,]"*Rosengren, supra* at 508, in this case, premeditated murder.

The third (and, we believe, key) kind of prejudice is impairment of defense. Here, no witness died during the period from 2001 through 2004.[10] There is no evidence of any prejudice from this particular delay. We agree with the prosecution that, *on the record before us*, the record fails to indicate that the specific delay from 2001 to 2004 prejudiced defendant's ability to mount a defense by way of lost evidence, witnesses, or memory. The record does not indicate that any witnesses died, fled, or otherwise became unavailable during the delay from 2001 to 2004. There is no evidence that memories would have faded during from 2001 to 2004, if they had not already done so from 1994 to 2001.

Notably, the trial court never concluded that defendant was prejudiced specifically by the delay from 2001 to 2004. Because the trial court never concluded that there was prejudice from the delay from 2001 to 2004, and because there is no evidence of any prejudice to defendant's

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[8] We weigh defendant's failure against defendant, because of the risk that a defendant might purposely or negligently "lie in wait," and then "spring" and seek to obtain a complete dismissal as a result of the delay.

[9] *Cleveland Williams* categorized the kinds of prejudice into two types: prejudice to defendant's person and prejudice to his defense. *Cleveland Williams, supra* at 264.

[10] The only death of a witness, Frederick Williams, occurred in May 1999, during the first post-arrest period during which there were trial court and appellate proceedings relating to defendant's pretrial motions. We have already concluded above that this first post-arrest period of delay cannot form the basis for a speedy trial violation claim, since this time period was filled with such proceedings. Therefore, the death of Williams cannot form the basis for a prejudice claim by defendant.

defense from that specific delay, we conclude that the prosecution has met its burden of showing that there was no prejudice from this particular delay. *Cleveland Williams, supra* at 262, 265 (for a delay was 19 months, defendant "did not demonstrate that any delay prejudiced the defense of his case").

Per the above analysis, one factor weighs in defendant's favor, another weighs slightly in defendant's favor, and two factors weigh in the prosecution's favor. Gauging these factors, and in particular the lack of evidence of prejudice from the delay from 2001 to 2004, we find, under the particular circumstances on the record before us, that on balance these factors weigh in favor of the prosecution and against dismissal of the charges. Therefore, although we find this to be a close question,[11] we reject defendant's speedy trial violation claim.

IV.

We reject defendant's claim that he was denied his state and federal rights to a speedy trial. The first post-arrest period of delay, from 1998 to 2001, was filled with trial court and appellate proceedings relating to defendant's pretrial motions. The second post-arrest period of delay, from 2001 to 2004, did not result in any prejudice to defendant. Therefore, we reject defendant's speedy trial violation claim and hold that the trial court erred in dismissing the charges.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Joel P. Hoekstra
/s/ Kurtis T. Wilder
/s/ Brian K. Zahra

[11] We caution prosecutors that they should not assume that three year delays following conclusion of appellate litigation are generally not to be considered excusable, regardless of whether a defendant asserts his speedy trial right.